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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

Nos. 73-556, 73-795

FLORIDA POWER & LIGHT COMPANY,
Petitioner,
vs.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MOTION AND BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF.

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief *amicus curiae* on behalf of the petitioners in these cases.

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court.**

The issue in this case is of major importance to members of the chamber. This issue is: whether the National Labor Relations Act prohibits a Union from disciplining a supervisor, who is a union member, for performing, during a strike, work ordinarily belonging to striking non supervisory employees.

The National Labor Relations Board concluded that this discipline was statutorily proscribed because a union cannot

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** *E.g., Gateway Coal Company v. United Mineworkers of America, et al.*, ... U. S. ....., 85 LRRM 2049 (Jan. 1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkle, et al.* (Supreme Court), No. 72-1554; *Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife* v. *Charles Odegaard, President of the University of Washington, et al.* (Supreme Court), No. 73-235; *N. L. R. B.* v. *Bell Aerospace Company Division of Textron, Inc.* (Supreme Court), No. 72-1598. *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 517 (1971).

punish supervisory personnel for furthering their employer's interest by performing rank and file work during a strike. The Court of Appeals for the District of Columbia Circuit had initially affirmed the Board in a panel decision. Subsequently, however, it replaced this decision by a five-to-four en banc decision and there refused to enforce the order of the Board. In its en banc holding, the Court stated that Section 8(b)(1)(B) proscribes only union attempts to discipline supervisors for the manner in which they performed *normal management functions*, such as regular supervisory work, the adjustment of grievances, or actual collective bargaining.

Affirmance of the en banc position of the Court of Appeals would pose a problem of considerable magnitude for employers in industries, such as construction and graphic arts, for example, where supervisors are often or customarily members of unions. If a union is to be permitted to discipline supervisors, who are also union members, because they perform rank and file work during a strike, an employer will be effectively precluded from utilizing such persons to perform this work and from reducing the severity of the economic pressure resulting from the work stoppage. Furthermore, the disciplinary action permitted by the Court of Appeals would severely abridge management's control over its supervisory staff; thus, this discipline, if found to be lawful, would permit a union effectively to create an intolerable conflict between inconsistent allegiances. The Chamber is, thus, vitally concerned that the issue in these cases be properly resolved by this Court. Because of its broad representation of employers, the Chamber is in a position to present arguments concerning these issues which might not otherwise be advanced by the parties.

Wherefore, for the foregoing reasons, the Chamber of Commerce of the United States respectfully requests that this Motion for Leave to File an Amicus Curiae Brief be granted. Filed herewith in our brief as amicus curiae.

Respectfully submitted,

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

SUMMARY OF THE ARGUMENT.*

Each of these cases arose from an economic strike. In each of these cases, supervisors of the Employer, who were members of the Union, performed work ordinarily belonging to the striking non supervisory employees. Each Respondent Union fined and/or suspended these supervisors for performing this work. The National Labor Relations Board found that the Union's disciplinary action violated Section 8(b)(1)(B) of the National Labor Relations Act. While the court below reversed, the Board's findings are wholly justified.

In order to properly evaluate the scope of Section 8(b)(1)(B), the express terms and history of that section must be considered in conjunction with the legislative history of other sections, dealing supervisors, found in the Act. When this analysis is made, it is manifest that Congress intended that supervisors be part of management and that their employer have complete control over their job related functions. The legislative history of the relevant statutory sections further demonstrates that Congress desired to ensure that the supervisor's obligations to his employer would be paramount, despite any obligations to the union that he might owe, and that an employer would be insulated from union pressure directed against his supervisors.

The courts and Board, responding to this Congressional mandate recognized that a supervisor, once disciplined for simultaneously supporting his employer's position and opposing the union's, whatever the nature of the dispute, will be susceptible to union pressure when again called upon to decide whether to support either his employer or the union; because of this discipline, an employer is no longer able to rely upon the loyalty of his supervisor to adjust grievances on his behalf or to perform other managerial duties, and his control over him is irretrievably

* The interest of the Amicus is contained in the Motion for Leave to File an Amicus Curiae Brief which accompanies this brief.

lost. Accordingly, to ensure that an employer will retain control over his representatives consistent with the expressed will of Congress, this Court should hold that a union may not discipline a supervisor for performing any duties related to his management role, whether or not these duties are connected with collective bargaining or the adjustment of grievances.

When a supervisor, during a strike, performs work ordinarily belonging to striking rank and file employees, he is exercising his managerial responsibilities, and, in addition, is engaged in the process of collective bargaining. By performing this work, supervisors provide their employer with the necessary leverage to better withstand the pressures and impact of the strike. Insofar as supervisors thereby enable the employer to meet his business commitments, they are performing the essence of a manager's functions. Furthermore, a strike is a part of the collective bargaining process. Thus, a supervisor's performance of necessary work in order to combat a strike is as much of a collective bargaining function as is the negotiation of a contract or the adjustment of a grievance. Consequently, disciplining a supervisor in retaliation for his performance of necessary work during a strike violates the express terms of the Statute and contravenes the explicit intent of Congress The discipline in these cases is contrary to the policy of Congress that protects the employer-supervisor relationship. Therefore, this Court's decision in *Allis-Chalmers* does not insulate the discipline in these cases from the proscriptions of the Act.

ARGUMENT.

I.

INTRODUCTION AND CONTENTIONS OF THE AMICUS.

The issue in these cases is whether the Respondent Unions violated Section 8(b)(1)(B) of the National Labor Relations Act[1] when they disciplined the Employers' supervisors, who were members of the Unions, for performing, during strikes, work ordinarily performed by non-supervisory striking employees. In resolving this issue, an evaluation of the proper scope of the Statutory Section is first required. The *amicus* contends that Section 8(b)(1)(B), despite its express terms, cannot be limited to proscribing only union discipline of an employer's representative that is grounded upon his actions taken in a specific dispute involving the negotiation or administration of a collective bargaining agreement or the adjustment of a grievance. Rather, when considered in conjunction with the legislative history of other statutory sections dealing with supervisors, Section 8(b)(1)(B) prohibits a union from disciplining a supervisor because he exercised his supervisory or managerial responsibility and furthered his employer's interests. This prohibition extends to every dispute that arises between an employer and a union regardless of the nature of the dispute.

In addition, the *amicus* contends that the concept of supervisory or managerial responsibilities or functions embraces the

1. 29 U. S. C. Section 158(b)(1)(B) provides:
"It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

performance of work ordinarily belonging to rank and file employees who are on strike. By performing this work the supervisors are furthering their employers vital interests.

Finally since the performance of this work effects the bargaining posture of the parties, the amicus contends that any union discipline is proscribed by the literal terms of Section 8(b)(1)(B).

In the administrative decisions underlying this proceeding, the National Labor Relations Board construed Section 8(b)(1)(B) to limit the right of a union to lawfully punish supervisory personnel, who were union members, in retaliation for their performance of the work of rank and file employees when these employees were on strike.[2] Essentially, in each case, the National Labor Relations Board considered the strike to be an economic dispute between the employer and the union and upheld the statutorily sanctioned right of an employer to control his supervisors and to utilize them in order to maintain his production despite the strike. The Board concluded that to permit union discipline where supervisors support their employer during a strike, would significantly jeopardize the employer's future relationship with and control over his supervisors. That is, whenever employer and union interests clashed, for example, during strike situations or grievance conferences, supervisors, wary of their union's disciplinary rights, would be susceptible to its pressure to deviate from the employer's interests.

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2. *Electrical Workers Locals 641, 622 etc. (Florida Power and Light Co.)*, 193 NLRB 30 (1971); *Electrical Workers Local 134 (Illinois Bell Telephone Co.)*, 192 NLRB 85 (1971), enforcement denied *en banc*, 487 F. 2d 1143 (CA D. C. 1973). In addition, see *N. L. R. B.* v. *Electrical Workers, Local 2150 (Wisconsin Electric Power Co.)*, 192 NLRB 77 (1971), enforced 486 F. 2d 602 (CA 7, 1973) (petition for rehearing denied, August 6, 1973) (petition for cert. filed, No. 73-877, Dec. 5, 1973).

II.

SECTION 8(b)(1)(B) PROHIBITS A UNION FROM DISCIPLINING A SUPERVISOR BECAUSE HE EXERCISED HIS SUPERVISORY OR MANAGERIAL RESPONSIBILITIES AND FOSTERED HIS EMPLOYER'S INTERESTS.

A. Legislative History.

The Board's findings in the instant cases are fully supported by the pertinent legislative history of 1947 amendments to the National Labor Relations Act. These amendments and Congressional debate underlying them demonstrate that Congress' propelling intent was to assure that an employer has complete control over his supervisory force and that he be insulated from union pressures exerted to procure the allegiance of supervisors to the union's own interests. Thus, supervisors were excluded from the Act's definition of "employee",[3] and while they were permitted to join unions, employers were not required to recognize or to deal with these "unions."[4]

In commenting on Sections 2(3) and 14(a),[5] Senator Taft explained:

> "It is felt very strongly by management that foreman are part of management that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various inbetween steps, but the general conclusion was that they must either be a part of a management or a part of the employees. . . *The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and pro-*

3. 29 U. S. C. Section 152(3) (1970) (Section 2(3)).

4. Du Ross, III, *Limitations upon Union Discipline of Supervisor Members Under the National Labor Relations Act,* 5 Southwestern U. L. Rev. Winter 1974, 311, 315 (1973). (Hereinafter referred to as *Limitations Upon Union Discipline.*)

5. 29 U. S. C. Section 164(a) (1970) (Section 14(a)).

ductivity in the factories of the United States." 93 Cong. Rec. 3952 (1947), in II Legis. Hist. at 1008-1009 (emphasis added).

Senator Ball's remarks are consistent with Congress' paramount concern that the loyalty of supervisors to their employees' position be unimpeded by the threat of union pressure.

> "The committee took the position that foremen are an essential and integral part of management, and that to compel management to bargain with itself, so to speak, by dividing the loyalties of foremen between the union and the employer, simply did not make sense, and inevitably would prove harmful to the free-enterprise system. It might be stated that both the House and Senate bills deal with that subject in substantially the same way."[6]
>
> . . .
>
> "Foreman are an integral part of management and are so regarded now in the law. But the NLRB has also held that they can at the same time be subject to the discipline of the unions of employees they supervise, which just doesn't make sense."[7]

The House, like the Senate, was cognizant of the critical need for employer's to control their agents and that the menace of union punishment could dissipate this necessary control.

In the words of House Report No. 245:

> "*Management, like labor, must have faithful agents.*—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence of control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it,

6. 93 Cong. Rec. 5146 (1947 in II Legis. Hist. at 1496).
7. 93 Cong. Rec. A 2377 (1947).

and to carry on the whole of labor relations . . . Supervisors are management people . . . So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an 'employer,' not an 'employee,' any person 'acting in the interest of an employer'; what it again made clear in taking up H. R. 2239 in 1943 and in dropping it when the Board decided the Maryland Drydock case, and what, for a third time, it made clear last year in passing the Case bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of that bill.

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness,' changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom for *any* reason, he does not trust."[8]

Thus, while the specific history surrounding Section 8(b)(1)(B) appears to limit that Section to its literal terms,[9] it is submitted that the construction of that section must be made in conjunction with other 1947 amendments and with the consistent preoccupation of Congress to ensure that employers would enjoy complete control over their agents, insulated from union pressures or the threat of union discipline.

In the words of Judge MacKinnon in the en banc decision of the court below,[10]

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8. H. R. Rep. No. 245, 80th Cong. 1st Sess. 16 (H. R. 3020), reprinted in I Legis Hist. 411.

9. 93 Cong. Rec. 4266 (1947) (Reprinted in II Legis Hist. at 1077: Unions had "taken it upon themselves to say that management should not appoint any representative who [was] too strict with the membership of the union." and through the enactment of section 8(b)(1)(B) Congress endeavored "to prescribe a remedy in order to prevent such interferences."

10. 487 F. 2d at 1176, 1177.

"Section 8(b)(1)(B) must not be interpreted in a vacuum, but must be interpreted in conjunction with the other 1947 amendments to the N. L. R. A. relating to supervisory personnel. The fact that Congress decided to expressly exclude 'supervisors' from the statutory definition of 'employee' in section 2(3) is highly informative.

"Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its *intent to make the obligations of the employer paramount.* That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of *ensuring their undivided loyalty, in spite of any union obligations.* See H. Rep. No. 245, 80th Cong., 1st Sess. 14-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); *L. A. Young Spring & Wire Corp.* v. *National Labor Relations Board,* 1947, 82 U. S. App. D. C. 327, 163 F. 2d 805, 20 LRRM 2606, certiorari denied 1948, 333 U. S. 837 * * *"[11]

The correctness of this statement is evidenced by the observations of Senator Taft's report on the proposed 1947 amendments. Taft explained that one of the "major changes" eliminates the genuine supervisor from the coverage of the Act as an employee and makes it clear that he should be deemed a part of management.

The purpose of making supervisors part of management was to assure that management will enjoy the "undivided loyalty of its foremen.[12]

While the court below construing Section 14(a) of the Act believed that an employer voluntarily ceded at least a portion

11. *Carpenters Dist. Council of Milwaukee* v. *N. L. R. B.,* 107 U. S. App. D. C. 55, 57, 274 F. 2d 564, 566 (1959) (emphasis added in original).

12. S. Rep. No. 105, 80th Cong., 1st Sess. 3, 5 (1947) (S. 1126) reprinted in I Legis. Hist. at 409, 411. Further examples of Congressional intent to protect employer's from all forms of union interference with their supervisors can be found in Du Ross, III, *Limitations Upon Union Discipline, supra,* at 315.

of his control over his supervisors by *permitting* them to join the union, the history of pertinent legislation is barren of support for that proposition. On the contrary, Congress repeatedly stressed its intent to exclude supervisors from the Act's protection and instead to subject them to the complete control of their employer.[13]

B. Judicial and Administrative Decisions.

The response of the Board and courts to these amendments was not long in coming. Early decisions stripped supervisors of the Act's protection[14] and found Section 8(b)(1)(B) violated

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13. In the first place, Section 14(a) of the Act must be interpreted with Section 2(3) of the Act. S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947) Reprinted I Legis. Hist. at 411; see Judge MacKinnon's dissenting opinion in the court below. It cannot then be doubted that Congress chose to ensure that supervisors wholly represent management regardless of any union commitments.

> "[Supervisors] are supposed to represent management, they are supposed to direct and to discipline and to be loyal to the management's point of view"; 93 Cong. Rec. 3553 (1947). "One cannot serve two masters. It would be an utterly impossible position in which to place a man—he would be paid by his employer but he [would be] expected to go along with the union of which he was a member." 93 Cong. Rec. A. 2011-12 (1974).

The House Report observes, "The bill does not forbid these people [i.e., supervisors] to organize. It merely leaves their oganizing and bargaining activities outside the provisions of the act." H. R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), in I Legis. Hist. at 314. Rep. Hartley further noted, "This bill also exempts supervisors from the compulsory features of the National Labor Relations Act. In other words, this bill does not bar them from organizing but they cannot obtain benefits of the act." 93 Cong. Rec. 3533 (1947), in I Legis. Hist. at 613.

Thus, it is apparent that by enacting Section 14(a) Congress did not intend to dilute or undermine the absolute control over supervisors that it bestowed upon employers.

14. *L. A. Young Spring & Wire Corp.* v. *N. L. R. B.*, 163 F. 2d 905, 906-07 (D. C. Cir. 1947), *cert. denied, Foremans' Assoc. of America* v. *L. A. Young Spring & Wire Corp.*, 333 837 (1948); *N. L. R. B.* v. *Budd Mfg. Co.*, 169 F. 2d 571, 579 (6th Cir. 1949), *cert. denied*, 335 U. S. 900, *modifying* 162 F. 2d 461 (1947), remanded, 322 U. S. 840.

when unions attempted to compel employers to substitute their chosen representatives with others more amendable to union views.[15]

In these early decisions the struggle was between the employer and union as each sought to secure effective control of the bargaining process; the supervisor involved was generally not the target of union discipline. After facing a virtually unchecked series of set backs in the Board and Courts, the unions turned their sights upon the supervisor himself and by punishing him for transgressing its views and supporting his employer's, sought to turn him from a representative loyal to his employer to one responsive foremost to the union. In the *Oakland Mailers* case[16] the National Labor Relations Board first confronted the issue of whether Section 8(b)(1)(B) proscribes union discipline of supervisors for demonstrating allegiance to their employer when performing managerial duties. Cognizant of the expressed will of Congress that management alone must control its supervisory personnel and that, if permitted, such discipline would be incompatible with this legislative mandate, the Board stated:

> " * * * Respondent's actions * * * were designed to change the Charging Party's representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondent's will. In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. [Footnote omitted.] That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the Charging Party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charg-

15. *ILGWU Local 111 (Slate Belt Contractors Assn.),* 122 NLRB 1390 (1958); *Southern Cal. Pipe Trades Council (Paddock Pools of Cal., Inc.),* 120 NLRB 249 (1958). For other more recent decisions see Du Ross, III, *Limitations Upon Union Discipline, supra,* at 315, 316.

16. *San Francisco-Oakland Mailers' Union No. 18,* 172 NLRB 2173 (1968).

> ing Party's control over its representatives. Realistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them." 172 NLRB at 2173.

The rationale of *Oakland* was applied in two recent cases, *Toledo Blade*[17] and *Horner*.[18] In *Toledo Blade*, supervisors were punished by the union, following a strike by a sister local, for performing work during this strike with less than the minimum crew specified by the applicable contract, and for performing more nonsupervisory work than allowed under the contract.

In *Horner*, no contract existed, and a supervisor was disciplined for signing a letter, issued by the employer, urging employees to vote against the union in an up coming election. In each case, the Board's finding that Section 8(b)(1)(B) was violated was affirmed by a court of appeals. While the decision in *Toledo*, unlike that in *Horner*, could have been molded to fit the explicit language of Section 8(b)(1)(B) by holding only that the supervisors were unlawfully disciplined because they interpreted the contract in a manner alien to the union's interests, both the Board and court in *Toledo* significantly chose instead to give a broader reach to that Statutory Section; a reach wholly consistent with the legislative disposition of the issue of union discipline of supervisory personnel.

In the Court's words:

> "This conduct of the union could very well be considered as an endeavor to apply pressure on the supervisory employees of the Toledo Blade, and to interfere with the performance of the duties which the employer required them to perform during the strike, and to influence them "to take action which it, the employer, might deem detrimental to its best interests. This conduct of the union would further operate to make the employees reluctant in

17. *Toledo Locals Nos. 15 and 272, Lithographers and Photoengravers International Union (Toledo Blade Co.)*, 175 NLRB 1072, *affirmed* 437 F. 2d 55 (CA 6, 1971).

18. *New Mexico District Council of Carpenters (A. S. Horner, Inc.)*, 176 NLRB 797, *affirmed* 454 F. 2d 1116 (CA 10, 1972).

the future to take a position adverse to the union, and their further usefulness to their employer would thereby be impaired." 437 F. 2d at 57.

In *Horner*, the Board held that the supervisor was disciplined "because he placed the Company's interests ahead of those of [the Union]," when performing the managerial duty of campaigning against the union, even though this function was perforce wholly unrelated to the negotiation or administration of an agreement or the disposing of grievances.

As the Board reasoned, this "was obviously coercion against the Company because it would tend to require the Company to retain as representatives for collective bargaining and adjustment of grievances only individuals who were subservient to respondents [Union] . . ."[19] Thus, as recognized by the court in *Toledo*, and the Board in *Horner*, it is this lingering aftereffect of the union's discipline, as much as the discipline itself, that is deleterious to the Employer's relationship with his supervisors. A supervisor, once disciplined for simultaneously supporting his employer's position and opposing the union's, whatever the nature of the dispute, will be susceptible to the threat of union pressure when again called upon to decide whether to stand either with his Employer or with the union.[20] It is logically and legally sound to conclude that the union's discipline has significantly and irreparably impaired the supervisor's value to represent his employer in adjusting grievances or in performing other functions where his employer's interests will clash with those of the union; because of this discipline, the employer is no longer able to rely upon his supervisory representative and his control over him is irretrievably lost.[21]

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19. 176 NLRB at 798.

20. Cox, *Some Aspects of the Labor-Management Relations Act*, 61 Harv. L. Rev. 1, 5 (1947).

21. A penalty imposed upon a supervisor may have a permanent effect and cause substantial economic loss unless it is retracted by the Union. See Du Ross, III, *Limitations Upon Union Discipline, supra*, at 336, with reference to financial and job referral benefits lost by disciplined supervisors. Pension and death benefits were lost by

Consequently, consistent with the legislative history and decisions recounted above, the *amicus* suggests the following rule: A union may not lawfully discipline a supervisor for performing any duties related to his management role, whether or not these duties are connected with the negotiation, interpretation or administration of collective bargaining agreements or the processing of grievances.[22] The rule here suggested is consonant with the mandate of Congress that management's control over his supervisor be unaffected by union ascendancy or obligations.

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supervisors in one of the instant cases, *Florida Power & Light Co.* Moreover, a disciplined supervisor may well have no recourse in law to recover his lost benefits. The Act does not regulate internal Union rules pertaining to eligibility for membership or financial benefits. *American Newspaper Publishers Association* v. *N. L. R. B.*, 193 F. 2d 782, 800 (CA 7, 1951), *cert. denied*, 344 U. S. 812 (1952). In addition, supervisors may be precluded from suing in state courts by the doctrine of preemption. *Iron Workers Local 207* v. *Perko*, 373 U. S. 701, 706-708 (1963). Accordingly, to encourage the Union to relent and remove its penalty, it is wholly reasonable to conclude, as did the Board, that a once disciplined supervisor would align himself with the Union's position during future production or grievance confrontations between the union and his employer. The employer must, therefore, choose between replacing his selected representative or accepting non-representation by him. The court below has erroneously substituted its judgment for that of the N.L.R.B. in an area within the special competence of that agency—inferences to be drawn from facts. *Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, 48-50 (1954); *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488, 490 (1951).

22. It would be unnecessary to establish that the Union's discipline succeeded in requiring the employer to replace the supervisor. *Meat Cutters Local 81* v. *N. L. R. B.*, 458 F. 2d 794, 801 n. 20 (C. A. D. C., 1972).

III.

A SUPERVISOR IN PERFORMING THE WORK OF STRIKING EMPLOYEES IS EXERCISING A SUPERVISORY RESPONSIBILITY OR FUNCTION AND IS ENGAGED IN THE PROCESS OF COLLECTIVE BARGAINING.

In applying the just enunciated rule to the instant cases, the amicus asserts that supervisors are exercising a vital managerial responsibility when, during a strike, they perform work ordinarily belonging to the striking employes. Retalitory discipline by the union for this performance, therefore, violates the Act.

It is undisputed that a supervisor, while construing an agreement or adjusting a grievance, is acting as a managerial representative. A strike has potentially far graver ramifications for an employer than does the resolution of a grievance or the interpretation of an existing agreement by a supervisor. In addition to likely irreplacable losses of customers and good will, the outcome of the strike determines the nature of the agreement that will both immediately bind the parties and serve as a floor for prospective contracts. Since the employer's ability to withstand the economic tensions of a strike will significantly effect its outcome, it is essential for the employer to marshal all possible forces to produce a favorable result. To this end management has "traditionally relied upon its supervisors to pitch in and perform rank and file work" in order both to enhance its bargaining posture and to diminish the adverse economic repercussions that will necessarily follow in the wake of the strike.[23]

It is during the critical period of the strike that the supervisor's managerial status and attendant loyalty most benefits his employer; supervisors are likely well acquainted with the duties of the rank and file and thus are the persons most able to immediately step in and support their employer's production and

23. *NLRB* v. *Electrical Workers Union 2150, supra; Electrical Workers Locals 641, 622 etc.* v. *NLRB, supra.*

customer service requirements. When supervisors provide their employer with economic leverage during the strike they are performing their management roles just as they are when representing their employer in a grievance dispute. Indeed, insofar as their performance of rank and file work enables their employer to meet his business commitments, their performance is the essence of the managerial function.[24] Consequently, pursuant to the rule previously articulated, union discipline aimed at frustrating this performance violates Section 8(b)(1)(B).

In addition, when an employer utilizes his supervisory staff to carry out assignments normally performed by striking employees, he is employing them directly in the process of collective bargaining, just as he would be if he utilized them to negotiate or administer a contract, since economic force is recognized as part of the bargaining procedure. As this Court has stated: "It is well recognized that the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining."[25]

Consequently, when a union penalizes the foreman in an attempt to dissuade him from preserving his employer's interests

24. This utilization of supervisory personnel is wholly consonant with the design of Section 8(b)(1)(B), 2(3) and 14(a), which, as previously demonstrated, was to ensure that the employer will have completely loyal supervisors under his control. Congress apparently at least has implicity recognized that an employer has a right to secure strike solidarity among its supervisory employees just as a union may promote this solidarity among its non supervisory members. The Senate Report indicated that in exempting supervisors from the operation of the Act, Congress was concerned about restoring some semblance of a balance of collective bargaining power between unions and employers. The Report found that the organization of supervisors with the resulting rights under the National Labor Relations Act "probably more than any other single factor ha(d) upset any real balance of power in the collecting-bargaining process. . . ." S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947) in I Legis. Hist. at 409. *Electric Workers Locals 641, 622, etc.* v. *NLRB supra.*

25. *NLRB* v. *Insurance Agents International Union,* 361 U. S. 477, 495 (1960).

by performing necessary work during a strike, it directly intrudes upon the employer's statutory right to select and to rely upon supervisory representatives to perform collective bargaining duties during the strike.[26] Thus, when a union punishes a supervisor for performing rank and file work ordinarily belonging to the striking employees, it has contravened the explicit terms of Section 8(b)(1)(B).

IV.

THIS COURT'S ALLIS-CHALMERS DECISION DOES NOT IMMUNIZE THE UNION'S DISCIPLINE FROM THE PROHIBITIONS OF SECTION 8(b)(1)(B).

While the court below relied upon the Allis-Chalmers'[27] case to support its holding, any suggestion that this case has controlling significance must be rejected.[28] This Court has stated that the decision in *Allis-Chalmers* recognized that Congress did not intend Section 8(b)(1)(A) to prohibit the imposition of union fines *not otherwise proscribed by the Nation's labor policy*.[29]

This policy, as evidenced by the statutory provisions dealing with supervisors, prohibits unions from exerting pressure in order to turn an employer's representatives against him and instead, expressly protects the employer-supervisor relationship. Since union discipline aimed at inducing a supervisor to deviate from his employer's position contravenes this policy, the rationale underpinning *Allis-Chalmers* does not serve to immunize the

26. The effect of union discipline is, of course, not limited to the punished supervisor. Other foremen, though not penalized, will be wary of offending the union while performing their managerial duties.

27. *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U. S. 175.

28. *Electrical Workers Local 2150 (Wisconsin Electric Power Co., supra.*

29. In *Schofield* v. *NLRB* 394 U. S. 423, 430 (1960) thus Court stated that the Allis-Chalmers rationale only permits "a union * * * * to enforce a properly adopted rule which reflects a legitimate union interest (and) impairs no policy Congress has imbedded in the labor laws."

union's discipline in the instant cases from the proscriptions of Section 8(b)(1)(B).

The court below, relying upon *Allis-Chalmers,* failed to recognize that this Court's decision there considered only a situation where the union disciplined *employee-members.* In this context, this Court acknowledged generally the union's power to discipline these employees in order to preserve its status as an effective bargaining agent.

Here, the issue involves discipline not of employees but rather of *supervisors* who are clearly and indisputably part of management. As demonstrated above, the employer's right to rely upon and to control his supervisory staff is paramount and this right cannot be limited by any obligations their supervisors may owe to the union. Consequently, where the right of an employer to have loyal supervisors under his control clashes with the desire of a union to promote strike solidarity, the former must prevail.

CONCLUSION.

For the foregoing reasons, the judgment of the court below should be reversed and the Board's orders enforced.

Respectfully submitted,

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